

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BA Desarrollos LLC

v.

Argentine Republic

(ICSID Case No. ARB/23/32)

**PROCEDURAL ORDER No. 7
(On Request for Bifurcation)**

Members of the Tribunal

Ms. Deva Villanúa, President of the Tribunal

Mr. Stephen L. Drymer, Arbitrator

Mr. Luis Alberto González García, Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

Assistant to the Tribunal

Mr. Ethan Shannon-Craven

9 September 2024

I. Procedural Background

1. This arbitration has been instituted by BA Desarrollos LLC [**“BA Desarrollos”** or **“Claimant”**] against the Argentine Republic [**“Argentine Republic”**, **“Respondent”** or **“State”**, and, together with Claimant, the **“Parties”**], pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [**“ICSID Convention”**] and under the Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 1991 and entering into force on 20 October 1994 [**“Treaty”**]. This proceeding is governed by the ICSID Arbitration Rules in force as of 1 July 2022 [**“ICSID Arbitration Rules”**].
2. On 15 March 2024, the Arbitral Tribunal issued Procedural Order [**“PO”**] No. 1.
3. On 29 March 2024, Claimant filed its Memorial on Jurisdiction and the Merits [**“Memorial”**].
4. On 28 June 2024, Respondent submitted its Request for Bifurcation [**“Request for Bifurcation”**].
5. On 8 August 2024, Claimant submitted its Observations on the Request [**“Response”**].
6. Upon deliberation, the Tribunal issues this decision on the Request for Bifurcation within the time limit set forth in the procedural calendars attached as Annex B to Procedural Order No. 1 [**“Procedural Calendars”**].

II. Facts

7. In 2016, the government of the city of Buenos Aires launched a road modernization project called “Paseo del Bajo”. To the east of Paseo del Bajo, there was vacant or underutilized state-owned land which, according to Claimant, was at odds with those renovation plans; this prompted the State to call an auction for their sale and subsequent real estate development as residential and office buildings. The entity in charge of the auction sale was the Argentine State Property Management Agency (*Agencia de Administración de Bienes del Estado*) [**“AABE”**].
8. Claimant has explained that Argentina promoted this auction both nationally and internationally, thus attracting the attention of the EMS Group – an investment group in high-end large-scale real estate projects (among others).¹ The participation of the EMS Group in the auction was structured as follows: BA Desarrollos (Claimant in this arbitration) was created as a special purpose vehicle, managed by EMS Capital LP; and BA Desarrollos constituted a real estate trust in Argentina, called Fideicomiso BAP,² as settlor/owner

¹ Memorial, para. 6.

² Memorial, para. 6.

(*fiduciante*), beneficiary (*beneficiario*) and residuary beneficiary (*fideicomisario*). The interrelationship between these entities shall be relevant when analyzing the jurisdictional objections raised by the Argentine Republic.

9. In August 2018, Fideicomiso BAP was awarded two plots of land at auction, paying a total of USD 49.08 M for them,³ with the intention of developing a real estate project on them.
10. According to Claimant, the project was frustrated by Respondent's allegedly obstructive conduct, and by its subsequent expropriation.
11. On 30 December 2020, notice was served upon the AABE of an administrative claim based on a series of obstacles affecting the acquired plots and the development of the project. The content of this claim and the identity of the plaintiff shall be of importance in assessing certain jurisdictional objections.
12. In Claimant's opinion, the conduct described above, attributable to the Argentine Republic, entails a breach of the fair and equitable treatment standard, including a prohibition on impairing investments by arbitrary or discriminatory measures, and a prohibition on expropriating without adequate compensation, as set forth in Arts. II(2) and IV of the Treaty, and giving rise to the commencement of this arbitration.

III. Applicable Standard

13. The Argentine Republic submits its Request for Bifurcation under ICSID Arbitration Rule 44(2), which reads as follows:

“Rule 44: Preliminary Objections with a Request for Bifurcation

...

(2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

- (a) bifurcation would materially reduce the time and cost of the proceeding;
- (b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and
- (c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.”

14. At the core of the circumstances to be taken into account by the Arbitral Tribunal is whether bifurcation would result in procedural efficiency. Respondent argues that the bifurcation of jurisdictional objections is the option that offers the greatest procedural efficiency, while Claimant denies this.
15. In this regard, the Arbitral Tribunal notes that Respondent has reserved the right to raise jurisdictional objections other than those raised in its Request for Bifurcation at a later stage.⁴

³ Memorial, para. 7.

⁴ Request for Bifurcation, footnote 1.

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16. This action by Respondent is perfectly legitimate in accordance with ICSID Arbitration Rule 45(b)(i), which allows it to raise objections until the filing of the Counter-Memorial.
17. However, the Tribunal cannot ignore the possibility that, were it to bifurcate and reject the jurisdictional objections, it is still possible that after examining the merits the claim be dismissed on account of new jurisdictional objections being upheld – thus completely frustrating the intended efficiency of bifurcation.
18. This reservation of actions does not preclude the Arbitral Tribunal from nevertheless deciding to proceed with bifurcation, but it does impose a higher standard on Respondent when trying to persuade the Arbitral Tribunal of the relevance of the jurisdictional objections raised. Thus, should Claimant succeed in casting doubt on the binding force of such objections, the Arbitral Tribunal will be inclined not to bifurcate.

IV. Discussion

19. The Argentine Republic has raised a total of three groups of jurisdictional objections (**1. – 3.**), which it considers to be of sufficient importance to warrant that they be considered separately from the merits of the case. Furthermore, it considers that the agreed Procedural Calendars, in the case of both bifurcation and non-bifurcation, support the notion that this would result in procedural efficiency (**4.**).

1. Denial of benefits

20. Art. I(2) of the Treaty establishes the following:

“Article I

(2) Each Party reserves the right to deny to any company of the other Party the advantages of this Treaty if (a) nationals of any third country, or nationals of such Party, control such company and the company has no substantial business activities in the territory of the other Party, or (b) the company is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.”

21. The article – as applied to the case – lays down two alternative requirements to allow the Argentine Republic to deny benefits:
 - That nationals of a third party control BA Desarrollos and that the company has no substantial business activities in the United States of America; or
 - That BA Desarrollos is controlled by nationals of a third country with which the Argentine Republic does not maintain normal economic relations.
22. The second requirement is not satisfied. As for the first requirement, it is twofold. In this regard, neither Party disputes that nationals of a third country control BA Desarrollos; the discussion focuses on the second part: whether or not BA Desarrollos has substantial business activities in the territory of the United States of America.

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23. In essence, Argentina argues that BA Desarrollos has no full-time employees exclusively engaged in commercial activities in the United States of America,⁵ no offices of its own,⁶ no expenses linked to business transactions in the United States of America;⁷ it only pays the minimum tax associated with its mere existence as a company registered in Delaware⁸ and has no governing bodies based in Delaware.⁹ For Respondent, it has been proven that Claimant has no genuine connection with its home State.¹⁰
24. Claimant does not deny the above facts, but deems them to be irrelevant.¹¹ BA Desarrollos is a limited liability company created as a special purpose vehicle for the purpose of real estate development in Argentina,¹² the business activity of which is carried out on its behalf¹³ through its manager, EMS Capital LP, based in New York.¹⁴ Claimant contends that the decision to act directly, or indirectly through EMS Capital LP, is purely commercial in nature and should not condition the assessment of whether or not there are “substantial business activities” in the United States of America – this has been expressly recognized by other arbitral tribunals.¹⁵
25. In any event, Claimant contends that Respondent is invoking the denial of benefits in an untimely fashion, after the alleged violation of the Treaty has already occurred; that is, it seeks to assert the denial of benefits with retroactive effect – something that is not permitted.¹⁶ Respondent denies this and argues that the Treaty does not impose any time limit on its right to invoke the denial of benefits; this has been allegedly recognized by prior awards.¹⁷
26. The Arbitral Tribunal, by majority, finds that the jurisdictional objection raised by Respondent is not without controversy: whether the denial of benefits has been invoked belatedly is a disputed issue. Furthermore, even if this had not been the case, it would remain to be determined whether the activity conducted in the United States of America by EMS Capital LP (allegedly) on behalf of Claimant would be sufficient to preclude the exercise of the denial of benefits.

⁵ Request for Bifurcation, para. 41.

⁶ Request for Bifurcation, paras. 39 and 42.

⁷ Request for Bifurcation, para. 43.

⁸ Request for Bifurcation, para. 45.

⁹ Request for Bifurcation, para. 46.

¹⁰ Request for Bifurcation, para. 28.

¹¹ Response, para. 52.

¹² Response, paras. 51 and 53.

¹³ Response, para. 54.

¹⁴ Response, para. 55.

¹⁵ Response, para. 57.

¹⁶ Response, para. 46.

¹⁷ Request for Bifurcation, paras. 29-30.

2. Lack of investment

27. According to Respondent, the dispute arises out of the execution of a mere non-concluded transaction for the sale of land: a price was paid, but the ownership rights over the real estate property were not granted.¹⁸ Therefore, there is no risk inherent to a true investment.¹⁹
28. Claimant alleges that it has made an investment in the Argentine Republic, as it is the settlor/owner (*fiduciante*), beneficiary (*beneficiario*) and residuary beneficiary (*fideicomisario*) of Fideicomiso BAP, to which it has made equity and capital contributions.²⁰ And Fideicomiso BAP is the holder of the rights associated with the award of the plots at auction.²¹ The investment related to the development of a long-term real estate project as part of a program for the improvement and modernization of the city of Buenos Aires²², to which the winning bidder was bound to²³.
29. The Arbitral Tribunal notes that the objection raised by the Argentine Republic focuses not so much on the relationship between Claimant and Fideicomiso BAP (nominally, the entity that was awarded the plots), but rather on the nature of the alleged investment. Since this objection is so intertwined with the merits of the case, it is difficult for it to be addressed in a bifurcated manner as Respondent expects.

3. Choice of forum and local jurisdiction

30. Arts. VII(2) and (3) of the Treaty provide that:

“Article VII

(2) In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

- a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
- b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
- c) in accordance with the terms of paragraph 3.

(3) (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

- (i) to the International Centre for the Settlement of Investment Disputes (‘Centre’) established by the Convention on the Settlement of Investment

¹⁸ Request for Bifurcation, para. 66.

¹⁹ Request for Bifurcation, para. 67.

²⁰ Response, para. 93.

²¹ Response, para. 93.

²² Response, para. 95.

²³ Response, para. 97.

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Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ('ICSID Convention'), provided that the Party is a party to such convention; or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or
iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.”

31. When on 30 December 2020 notice was served upon the AABE of the administrative claim based on the lack of execution of the deeds for the plots awarded at auction,²⁴ this constituted a conscious choice of the local forum and, for purposes of the above-transcribed articles, the arbitral forum is already precluded and thus unavailable to Claimant, since both proceedings are grounded on the same fact.²⁵
32. Moreover, the correct forum in this case, which deals with purely contractual disputes, is the court of the Autonomous City of Buenos Aires, as expressly provided for in the terms and conditions of the auctions.²⁶
33. Claimant considers that, when analyzing the objection based on the choice of forum, the relevant proceedings must be compared in order to determine whether the triple identity test requiring identity of parties, cause of action and dispute is met.²⁷ Here, the test would not be met:
 - The plaintiff and claimant are not the same person: the local claim was filed by Fideicomiso BAP, whereas the claimant in this arbitration is BA Desarrollos;²⁸
 - The breach at issue in one and the other proceeding is different, since this arbitration concerns the breach of the Treaty;²⁹
 - The AABE is not even part of the Argentine judicial branch.³⁰
34. The Arbitral Tribunal is willing to accept as a working hypothesis that the same facts – in this case, the lack of execution of the deeds for some plots – may give rise to a breach of contract and, at the same time, to a breach of the Treaty. Thus, the fact that there may be an ongoing local proceeding, or a local forum provided for in the terms and conditions of the

²⁴ Request for Bifurcation, para. 58.

²⁵ Request for Bifurcation, para. 64.

²⁶ Request for Bifurcation, para. 6.

²⁷ Response, para. 85.

²⁸ Response, para. 78.

²⁹ Response, para. 80.

³⁰ Response, para. 82.

auctions in order to determine the propriety of the lack of execution of the deeds is not in itself sufficient to deny the jurisdiction of this Tribunal.

35. In any event, the Tribunal considers – as Claimant points out³¹ – that this issue is closely intertwined with the merits of the case and, therefore, it would be difficult for it be dealt with separately and in advance as Respondent intends through its bifurcation.

* * *

36. The Arbitral Tribunal, by majority, considers that the discussion raised by the Parties demonstrates that the jurisdictional objections are not without controversy. Applying the enhanced standard indicated in para. 18 *supra*, the Arbitral Tribunal, by majority,³² does not consider, *prima facie*, after having read the positions of both Parties, that Respondent's objections are of sufficient importance to warrant bifurcation.

37. This decision is also reached by taking into account the procedural efficiency considerations developed in the following paragraphs.

4. Procedural efficiency

38. Respondent highlights that, comparing the different Procedural Calendars agreed for the bifurcation and non-bifurcation scenarios, bifurcation would result in a saving of time and costs:³³ in case of bifurcation, there is a likelihood of total (or partial) dismissal of the case, without the need to analyze the merits.³⁴

39. Claimant compares the Procedural Calendars applicable in the event of bifurcation or non-bifurcation and considers that the saving would be minimal as the merits of the case do not require extensive investigation and, therefore, does not compensate running the risk associated with a bifurcation of unsuccessful jurisdictional objections.³⁵

40. The Arbitral Tribunal considers that the approach suggested by Claimant is logical, since it takes the Procedural Calendars and uses them as a basis for weighing the procedural gains in the most extreme scenarios:

- If the jurisdictional objections are bifurcated, the hearing would be held in July 2025, i.e., three months before the scheduled hearing date under the joint jurisdictional and

³¹ Response, para. 88.

³² Arbitrator González García agrees with the majority with respect to objections 2 (lack of investment) and 3 (choice of forum and local jurisdiction) in the sense that they do not warrant bifurcation of the proceeding for the reasons stated. The dissent lies in the analysis and reasoning with respect to objection 1 (denial of benefits). In the opinion of Arbitrator González García, Respondent has raised a serious and substantial objection regarding Claimant's control and the degree of importance of its economic activities in the territory of the United States of America. This issue is not related to the facts of Claimant's claim on the merits and, should the objection be upheld, could result in a complete dismissal of the claim.

³³ Request for Bifurcation, para. 82.

³⁴ Request for Bifurcation, paras. 82-84.

³⁵ Response, para. 113.

merits scenario; therefore, if the Tribunal were to uphold the objections, there would be a procedural saving of (at least) three months;

- If the jurisdictional objections are bifurcated, but unsuccessful, the hearing on the merits will not occur until February 2027 – which would add, on average, a year and a half to the length of the proceeding.

41. Non-bifurcation is procedurally more efficient.
42. In any case, as Claimant seems to point out, by insisting on non-bifurcation, despite the existence of jurisdictional objections, the risk associated with procedural inefficiency is primarily run by Claimant itself, which is bearing the procedural costs.³⁶ And were Respondent ultimately successful, it may claim its defense costs from Claimant.

V. Requests for relief and decision

43. The Argentine Republic has requested:³⁷

“In view of the foregoing, [that] the Tribunal ... grant the Request for Bifurcation of the Argentine Republic to address the preliminary objections at a separate stage of the proceedings pursuant to Rule 44(3) of the Arbitration Rules.”

44. BA Desarrollos requests the following:³⁸

“... That the Tribunal:

(a) DENY Argentina’s request for bifurcation and proceed with the non-bifurcated procedure set out in Procedural Calendar No 3 in Annex B of Procedural Order No 1; and

(b) ORDER Argentina to pay all costs and expenses incurred by BA Desarrollos in connection with Argentina’s Request for Bifurcation.”

45. The Arbitral Tribunal, by majority, decides not to bifurcate the proceeding and to reserve its decision on the costs arising from this procedural phase until a later date.
46. The Arbitral Tribunal finds that the present decision determines only whether the jurisdictional objections raised by Respondent in its Request for Bifurcation are of sufficient importance to warrant separate proceedings on the merits. In this regard, the conclusions reached by the Arbitral Tribunal in this decision in no way prejudice the content of the objections raised by Respondent.

³⁶ Response, para. 114.

³⁷ Request for Bifurcation, para. 87.

³⁸ Response, para. 120.

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On behalf of the Arbitral Tribunal,

[Signed]

Ms. Deva Villanúa
President of the Tribunal
Date: 9 September 2024